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Exempt from Filing Fees Pursuant to Gov. Code Section 6103

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

LEHIGH SOUTHWEST CEMENT COMPANY, a California corporation, HANSON PERMANENTE CEMENT, INC., an Arizona Corporation,

Plaintiffs,

v.

THE COUNTY OF SANTA CLARA, a municipal corporation, JACQUELINE ONCIANO, Director of Planning and Development for the County of Santa Clara, and DOES 1 THROUGH 100, inclusive,

Defendants.

No. 21CV376423

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO THE FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

Date: **8/18/21 at 1:30pm**
Time:
Dept.: 3
Judge: Honorable Patricia Lucas

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I. INTRODUCTION

This action arises out of an application by Petitioners Lehigh Southwest Cement Company and Hanson Permanente Cement Inc. (collectively, "Lehigh") to amend the reclamation plan for Lehigh's limestone and aggregate quarry to accommodate significantly expanded mining activities. In 2011, the County of Santa Clara ("County") Board of Supervisors ("Board") determined that Lehigh holds a vested right to mine certain parcels. But that right is not unlimited. State and County laws require operators to obtain a use permit for activities that exceed the scope of a vested surface mining right by substantially changing or intensifying the vested operation. Lehigh contends in its application that its new mining activities would be consistent with its vested rights, and the County is midstream in evaluating the merits of this claim. Rather than awaiting the County's administrative determination, Lehigh asks the Court to short-circuit it through this action by either declaring the results in the first instance or directing the County in mandamus to dispense with its evaluation altogether. The Court should decline the invitation.

Lehigh's declaratory relief claims fail for a number of reasons. They are wrongly pled, because declaratory relief is unavailable to interfere with an ongoing administrative process; unripe, because the dispute over the scope of Lehigh's vested rights is hypothetical and could be obviated by an adjudicatory decision in its favor; unexhausted, because the County has not even scheduled the requisite hearing; and meritless, because the County's 2011 vested rights decision did not and could not have addressed the new activities proposed in Lehigh's 2019 application. Lehigh's mandamus claims likewise founder on the pleadings because Lehigh fails to identify any clear and present duty that the County is not already discharging in processing Lehigh's application.

As Lehigh cannot cure these fatal defects in its pleading, Defendants respectfully request that this demurrer be sustained as to all causes of action without leave to amend.

II. FACTUAL BACKGROUND

A. 2011 VESTED RIGHTS DETERMINATION FOR PERMANENTE QUARRY

The Permanente Quarry ("Quarry") is located on a 3,510-acre property situated primarily in unincorporated County, with portions extending into the municipal boundaries of the cities of Cupertino and Palo Alto. (First Amended Petition and Complaint ("FAC") ¶¶ 11-12; Request for

Judicial Notice ("RJN"), Ex. A at p. 1 & Ex. C at Figure 2.) Lehigh's predecessor commenced surface mining operations at the Quarry around 1903. (FAC ¶ 24.) Lehigh currently operates the Quarry to produce limestone for processing into cement on an adjacent property, as well as aggregate for construction products. (*Id.* ¶¶ 13-15, 18-19.) Although the County zoning ordinance has required a use permit for mining operations like the Quarry since 1948, the County has never issued a use permit for the Quarry. (RJN, Ex. A at pp. 1-2; FAC ¶ 45.)

In 1975, the State Legislature adopted the Surface Mining and Reclamation Act, Public Resources Code section 2710 et seq. ("SMARA"), prohibiting mining operations without an approved reclamation plan and financing to ensure the mined land will be reclaimed to a usable post-mining state, as well as either a use permit or a vested right to conduct the mining operation as a legal non-conforming use. The County approved the first reclamation plan for the Quarry in 1985. (FAC ¶ 53.) In 2010, Lehigh applied to the County to amend the reclamation plan to reclaim additional mined lands. (*Id.* ¶ 57.) Recognizing that "the County ha[d] not previously made a specific determination concerning the geographic extent of the Quarry's vested rights," the County determined that it was necessary to hold a duly noticed public hearing to define the "geographic extent" of the Quarry's vested rights in order to process Lehigh's submittal. (RJN, Ex. A at p. 1.)

On March 1, 2011, following the public evidentiary hearing, the Board adopted a resolution on Lehigh's vested rights ("2011 Vested Rights Determination"). (FAC ¶ 67; RJN, Ex. A.) In it, the Board concluded that the Quarry became a vested legal non-conforming use in January 1948 ("Vesting Date") and that Lehigh has vested rights over thirteen parcels. (RJN, Ex. A at p. 2.) Following the 2011 Vested Rights Determination, Lehigh submitted a superseding reclamation plan amendment ("RPA") application, which the County approved on June 26, 2012. (FAC ¶¶ 75, 80.)

B. LEHIGH APPLIES TO SIGNIFICANTLY EXPAND QUARRY OPERATIONS

In early 2019, Lehigh informed the County of its intent to amend its 2012 Reclamation Plan. (FAC ¶ 85.) Following a preview meeting on Lehigh's proposal *(id.* ¶ 86), the County Department of Planning and Development ("Department") sent Lehigh a letter on May 17, 2019, informing it that the County must "determine whether the expanded surface mining and any associated activities" necessitating the RPA "fall within the scope of Lehigh's recognized vested rights." (RJN, Ex. E at

p. 2.) The letter explained that this "vested rights consistency determination" would consider whether the proposed uses "substantially change the Quarry's surface mining operations as they existed at the 1948 vesting date" or "impermissibly intensify the Quarry's mining operations." (*Ibid.*) The letter instructed Lehigh to include information on these issues in its application. (*Ibid.*)

On May 22, 2019, Lehigh submitted its application for a major amendment to the 2012 Reclamation Plan ("2019 Application"). (FAC ¶ 89; RJN, Ex. C.) The 2019 Application proposes significant modifications to current operations, including: (1) expanding mining into a new "60-acre reserve" (the "Rock Plant Reserve"), which the Application indicates "will be one of the most substantial new mining areas opened at the Quarry in several decades," (2) expanding mining operations in the North Quarry pit, and (3) utilizing an existing utility access road or establishing a new haul road to supply construction aggregate directly to an adjacent quarry. (RJN, Ex. C at pp. 6-9.) Lehigh supplemented its 2019 Application with a June 21, 2019 response to the Department's information requests on vested rights consistency and with additional submittals in September and October 2019 to address portions of its Application the Department had deemed incomplete. (FAC ¶¶ 91, 95; RJN, Ex. B, Att. D & Ex. F at p. 1.) The Department deemed the 2019 Application, as revised through these submittals, complete on November 8, 2019. (FAC ¶ 97; RJN, Ex. F.)

C. THE COUNTY PROCESSES LEHIGH'S MULTIPLE RPA APPLICATIONS

At the time Lehigh filed its 2019 Application, the Department was already processing a separate RPA application submitted by Lehigh on March 26, 2019. (RJN, Ex. D.) This separate "Haul Road Application" proposed to expand the 2012 reclamation boundaries by 63 acres to reclaim the utility access road to the adjacent quarry and other internal haul roads. (*Id.* at pp. 1-2.)

In its November 8, 2019 letter deeming Lehigh's 2019 Application complete, the Department informed Lehigh that it could not conduct environmental review of the project until Lehigh submitted "a single consolidated Reclamation Plan Amendment." (RJN, Ex. F at p. 3.) The Department subsequently sent Lehigh two letters requesting that it withdraw its Haul Road Application to provide the Department with "a single, internally consistent, and unified application for a Reclamation Plan Amendment." (RJN, Exs. G & H.) The State Mining and Geology Board likewise informed Lehigh in a March 11, 2020 decision declining to accept an unrelated appeal that

the two overlapping applications raise concerns with "piecemealing" of a single project and encouraged Lehigh to withdraw the Haul Road Application. (RJN, Ex. N at p. 2.) Lehigh withdrew the Haul Road Application on March 24, 2020. (RJN, EX. I.)

The County also cannot process the 2019 Application until Lehigh "approve[s] a budget and scope for the County['s]" environmental review of the project. (FAC ¶ 100.) The Department provided Lehigh a scope and budget on August 5, 2020. (RJN, Ex. B at p. 1.) On November 13, 2020, Lehigh sent the Department a letter objecting to the scope and refusing to provide comments. (RJN, Ex. J.) In response, the Department informed Lehigh in a December 29, 2020 letter that it would revise the scope in light of Lehigh's objections to allow environmental review to commence and simultaneously prepare for an evidentiary hearing before the Board on vested rights consistency. (RJN, Ex. K at p. 2.) Contrary to Lehigh's allegation (FAC ¶ 114), the letter neither stated nor suggested that the vested rights consistency hearing would reconsider the completeness of Lehigh's 2019 Application. (RJN, Ex. K.) The Department sent Lehigh the revised scope and budget on March 3, 2021 and requested payment again on April 9, 2021. (FAC ¶¶ 120, 123.) By letters dated March 26 and May 18, 2021, Lehigh again declined to provide comments or funds necessary to initiate environmental review. (RJN, Ex. B, Att. E & Ex. L.)

III. ARGUMENT

A. Declaration Relief is Unavailable and Premature

To qualify for declaratory relief, Lehigh's pleading needs to present two essential elements: "(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [Lehigh's] rights or obligations." (*Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.) Lehigh can show neither. Nor can it show that it has exhausted its remedies. As these defects are fatal to Lehigh's ability to state a cause of action and to the Court's jurisdiction, Lehigh's declaratory relief claims should be sustained without leave to amend. (Code Civ. Proc., §§ 430.10(a), (e); *Wilson v. Transit Auth. of City of Sacramento* (1962) 199 Cal.App.2d 716, 722; *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 634.)

1. Declaratory relief is not available to challenge application of zoning laws.

It is firmly established that declaratory relief under Code of Civil Procedure section 1060 is

not available to challenge a public agency's application of zoning laws to a particular property, or to intervene in the administrative process. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 155 (*Tejon*); *see State of California v. Superior Court* (1974) 12 Cal.3d 237, 249 ["It is settled that an action for declaratory relief is not appropriate to review an administrative decision."].) Rather, the proper remedy is a writ of administrative mandamus under Code of Civil Procedure section 1094.5 after the adjudicatory decision is final and administrative remedies exhausted. (*Tejon*, at p. 155.) This limitation on declaratory relief protects the jurisdiction of administrative agencies to reach administrative decisions in the first instance without interference from the courts. (*Walker v. Munro* (1960) 178 Cal.App.2d 67, 72; *see Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 664 ["The Declaratory Relief Act does not purport to confer upon courts the authority to control administrative discretion"].)

The County's authority to enforce limitations on the exercise of vested rights, and to adjudicate their bounds, is well settled. Although a vested mining right has certain unique attributes—it extends to areas where there was objective evidence of an operator's intent to mine at the time the use became non-conforming (*see Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533, 556 (*Hansen*)) —it remains subject to bedrock common law limits on the exercise of nonconforming uses. (*Id.* at p. 568 [following a "strict policy against extension or expansion of [nonconforming mining] uses"].) These limits reflect that "[t]he ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interest of those affected." (*Ibid.*) Consistent with this purpose, the County's surface mining ordinance, which implements State reclamation policy (*see* Pub. Resources Code, § 2774), requires a mining operator to obtain a use permit should the "proposed expansion of [its] existing surface mining operation . . . constitute[] a substantial change in such operation . . . by exceeding the vested right to such use." (County Zoning Ord., § 4.10.370(Part II)(B)(1); *see also id.* at § 4.50.020 (prohibiting intensification or expansion of nonconforming uses); Pub. Resources Code, § 2776 ["No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter . . . as long as no substantial changes are made in the operation[.]"]; *Hansen*,

at p. 571 [recognizing similar restrictions as "customary in zoning ordinances"].) The County is simply applying its commonplace zoning restrictions to the facts by considering whether activities proposed in Lehigh's 2019 Application exceed its vested rights. (*See Point San Pedro Coalition v. County of Marin* (2019) 33 Cal.App.5th 1074, 1082 [quarry exceeded vested rights by "unnaturally expand[ing] or increas[ing] its nonconforming use" in violation of zoning ordinance]; County Zoning Ord. § 4.10.370(Part I)(I)(2) [requiring finding that reclamation plan amendment conforms with State and County law].) Declaratory relief is not available to interfere with that determination.

To the extent that Lehigh believes the County's adjudicatory process to be unprecedented or unavailable, it is wrong. A similar set of circumstances underlay the Supreme Court's seminal vested rights decision in *Hansen*. The county there found it necessary to adjudicate whether the activities described in a proposed reclamation plan would exceed the operator's vested surface mining right and denied the plan when it found they would. (*Hansen*, *supra*, 12 Cal.4th at pp. 548-49.) The Court's decision sanctions this adjudicatory process, recognizing that common law, SMARA, and the county's zoning ordinance prevent an operator from initiating activities that substantially change the nature of the operation as it existed at the vesting date or from impermissibly intensifying the use by "propos[ing] immediate removal of quantities of rock which substantially exceed the amount of aggregate materials extracted in past years" without obtaining a use permit. (*Id.* at pp. 568, 575 & fn. 32.) As the "vested rights determination . . . governs the coverage of the reclamation plan," it is a necessary step in evaluating and rendering an approval decision on the plan. (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 626; *see Hansen*, at p. 574-75 [SMARA requires applicant to establish, "in conjunction with approval of a SMARA reclamation plan," that it "had obtained a vested right to conduct surface mining operations . . . and [that] the proposed mining is not a substantial change in the operation"].)

Further, *Calvert* dictates that the County render its decision on the consistency of Lehigh's proposed activities with its vested rights on an evidentiary record informed by a noticed public hearing. Recognizing "[t]he sheer quantity and complexity of . . . factual issues" involved, the court held that an agency's decision on a vested rights claim is adjudicative in nature and must be made following a noticed evidentiary hearing to satisfy the due process rights of the operator and adjacent

property owners. (*Calvert*, *supra*, 145 Cal.App.4th at pp. 625-26, 629.) This is so not only when an agency considers the existence of a vested right, but also when it considers whether activities constitute "substantial changes . . . in the operation" that exceed the scope of that right. (*Id.* at p. 624; *ibid.* [quoting 59 Ops.Cal.Atty.Gen. 641, 643 (1976)] [substantial change presents "questions of fact which can only be determined on a case-by-case basis in a proper vested rights proceeding before the lead agency"].) As in *Calvert*, Lehigh is not the only entity with a property interest at stake: the interests of adjacent landowners and municipalities that would be impacted by its proposed activities are at issue too and they, like Lehigh, are entitled to present evidence and argument at a public evidentiary hearing. (*See, e.g.*, RJN, Ex. M at pp. 4-6 [City of Cupertino letter].)

Lehigh's complaint ignores these dictates and flouts well-established limits on the Court's jurisdiction. Before an evidentiary record has even been developed or a hearing noticed, Lehigh asks the Court to declare that its proposed levels of production do not amount to impermissible intensification under *Hansen* and the County's Zoning Ordinance, and that production of "aggregate made from any rock types found in the Vested Parcels that have commercial value" is consistent with its vested rights. (FAC ¶¶ 141, 152, 161, 168.) Such fact-bound adjudicative decisions must be reached by the County before they may be evaluated—in administrative mandamus—by the Court.

2. Lehigh fails to plead a justiciable controversy.

In addition to being unavailable, Lehigh's declaratory relief claims are fatally premature. An action for declaratory relief requires an "actual controversy relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060.) An "actual controversy" for purposes of Section 1060 "is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117.) The "actual controversy" requirement is jurisdictional: without it, a dispute is not justiciable and is beyond the purview of the courts even if the party seeking relief is "intensely interested." (*California Water & Telephone Co v. Los Angeles County* (1967) 253 Cal.App.2d 16, 23 & n. 11.)

An "actual controversy" exists only if it is "ripe" in that it "has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be

made." (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540 (*Stonehouse*).) To be ripe, both prongs of a two-part test must be satisfied: (1) the dispute must be "sufficiently concrete that declaratory relief is appropriate" as opposed to abstract or hypothetical and (2) "withholding judicial consideration [must] result in the parties suffering hardship." (*Ibid.*) These two prongs together "prevent[] the court from issuing purely advisory opinions." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) Lehigh's claims fail both.

As to the first prong, Lehigh invites the Court to speculate about the hypothetical results of the County's future determination as to whether the mining-related activities proposed in its 2019 Application would substantially change its vested operation. The Court should decline to do so. (*See Stonehouse*, *supra*, 167 Cal.App.4th at p. 540 [controversy not ripe where it would require court "to speculate about hypothetical future actions" by administrative bodies].) No proceeding has taken place, and whether Lehigh's proposed activities will ultimately be restrained is purely conjectural.

The Supreme Court's decision in *State of California v. Superior Court* (1974) 12 Cal.3d 237, is on all fours. There, an applicant sought a declaration that it had a vested right to proceed with a development without a permit. Although the applicant, like Lehigh, alleged the existence of an actual controversy with respect to whether it had acquired a vested right, it was "clear from the face of the petition that it ha[d] not sought a vested rights determination . . . nor been denied" one. (*Id.* at p. 249.) Under those circumstances, the Court concluded that the applicant had not alleged an actual controversy entitling it to declaratory relief. (*Ibid.*) The Court should so conclude here as well.

As to the second prong, Lehigh cannot show that withholding judicial review would cause "imminent and significant hardship." (*Stonehouse*, *supra*, 167 Cal.App.4th at p. 540.) To the contrary, no factual record has been developed for the Court to evaluate Lehigh's claims about vested rights consistency. (*See id.* at p. 542 [second prong of ripeness test not satisfied where "the particular factual context has yet to be fully developed"].) At most, Lehigh, "would suffer a loss of . . . certainty" about the outcome of a future adjudicatory proceeding, but "[s]uch uncertainty is not the type of justiciable controversy contemplated by the existing precedents." (*Ibid.*)

3. Lehigh has failed to exhaust its administrative remedies.

Where a statute or ordinance provides an adequate administrative remedy, "resort to that

forum is a 'jurisdictional' prerequisite to judicial consideration of the claim." (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276.) As a consequence, "a controversy is not ripe for adjudication until the administrative process is completed and the agency makes a final decision that results in a direct and immediate impact on the parties." (*Ibid.*) The exhaustion doctrine protects "administrative autonomy" by ensuring that courts do "not interfere with an agency determination until the agency has reached a final decision" and allows them "to benefit[ ] from the expertise of an agency particularly familiar and experienced in the area." (*Tejon*, *supra*, 223 Cal.App.4th at p. 156.) To survive a demurrer, Lehigh "must allege facts showing that [it] did exhaust administrative remedies" or that it "was not required to do so." (*Ibid.*) Lehigh has done neither.

Lehigh asserts both that it has exhausted administrative remedies and that it would be futile to do so. (FAC ¶¶ 8-9.) But Lehigh concedes that the County has not reached a final administrative decision on vested rights consistency, nor even set an evidentiary hearing date, which is dispositive on exhaustion. (FAC ¶ 117.) As to futility, this limited exception "applies only if the party invoking it can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1313.) Not so here. While the Department has identified substantial questions about vested rights consistency that merit an evidence-based determination (FAC ¶ 107), Lehigh does not allege that either the Department or the Board has declared an outcome. (*Cf. Tejon*, *supra*, 223 Cal.App.4th at p. 158 [staff's opinion that permit would be denied did not make exhaustion futile].) These deficiencies deprive the Court of jurisdiction over the declaratory relief claims.

B. The County is Not Estopped from Making a Vested Rights Consistency Determination

The jurisdictional defects should dispose of Lehigh's declaratory relief claims. But if the Court looks further, it should sustain the County's demurrer to Lehigh's first three causes of action without leave to amend because Lehigh cannot allege facts sufficient to state its estoppel claims.

1. Lehigh's invocation of administrative finality and preclusion are misplaced.

Lehigh contends that the County is foreclosed by the doctrines of administrative finality and collateral estoppel from adjudicating vested rights consistency because the County's 2011 Vested Rights Determination was final and binding. Both doctrines are inapposite.

The doctrine of administrative finality considers whether an agency has exhausted its jurisdiction over a claim such that it possesses no further authority to reopen its decision. (*Lomeli v. Dept. of Corrections* (2003) 108 Cal.App.4th 788, 795.) The doctrine is inapplicable here, as the County does not dispute that its 2011 Vested Rights Determination has attained administrative finality nor assert authority to reopen it. (*See Redding Medical Center v. Bonta* (2004) 115 Cal.App.4th 1031, 1040-42 [administrative finality irrelevant where agency's evaluation of costs underlying depreciation claims did not reopen prior reimbursement determinations].) Rather, the County asserts authority to determine questions presented for the first time in Lehigh's 2019 Application: whether activities and levels of production the Application describes are consistent with Lehigh's recognized vested rights. The County *could not* have made these determinations in 2011 because the proposed activities—expanding North Quarry mining activities, opening a new pit, and exporting aggregate via a haul road to a neighboring quarry—were not then at issue.

Lehigh's use of collateral estoppel is equally far-fetched.[1] "Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.) Among other elements, the doctrine requires that the issue to be precluded is "identical to that decided in a former proceeding" and that it was "actually litigated" and "necessarily decided" in the former proceeding. (*Ibid.*) Collateral estoppel is typically asserted as a defense to preclude a plaintiff from relitigating an issue the plaintiff litigated unsuccessfully in a prior action. Where, as here, it is invoked offensively, its use "is more closely scrutinized." (*White Motor Corp. v. Teresinki* (1989) 214 Cal.App.3d 754, 763.)

Lehigh's contention that collateral estoppel applies fails for at least three reasons. First, the question whether the new and expanded activities proposed in Lehigh's 2019 Application exceed the scope of its vested rights has been neither "actually litigated" nor "necessarily decided" in any prior proceeding, nor could it have been as the issue was presented for the first time by Lehigh's 2019 Application. Nor is this inquiry "identical" to that undertaken by the Board in 2011. The 2011 Vested Rights Determination adjudicated the existence and geographic extent of Lehigh's vested

[1] Collateral estoppel is a "secondary aspect" of res judicata. (*People v. Sims* (1982) 32 Cal.3d 468, 477 fn. 6.) It is assumed that Lehigh invokes the doctrines interchangeably. (*See ibid.*; FAC ¶ 132.)

mining rights. (RJN, Ex. A.) It did not address what intensity of production may be consistent with those rights, nor whether specific activities only now at issue would constitute a substantial change. (*Ibid.*) Second, collateral estoppel is foreclosed by the Supreme Court's decision in *Hansen*, which recognized that agencies properly adjudicate impermissible intensification after an initial vested rights determination is reached. (*Hansen*, *supra*, 12 Cal.4th at p. 575.) And third, applying collateral estoppel here would effectively nullify Section 4.10.370(Part II)(B)(1) of the County's Zoning Ordinance by precluding the County from ever determining whether an operator is exceeding the scope of a recognized vested right. This result would be contrary to "the spirit and purpose" of zoning controls. (*Point San Pedro*, *supra*, 33 Cal.App.5th at p. 1082.)

2. Lehigh cannot state a claim for equitable estoppel.

Lehigh asserts that the County is equitably estopped from denying Lehigh's right to produce at intensities estimated in its 2012 Reclamation Plan or to produce aggregate "from any rock types . . . that have commercial value." (FAC ¶¶ 141, 152.) To make out its claims, Lehigh must show that the County intentionally led Lehigh to believe these circumstances to be true and that it relied on that conduct to its injury. (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279.) Lehigh cannot. Lehigh asserts that the Board's resolution approving the 2012 Reclamation Plan "expressly determined" that it had a vested right to produce at certain production volumes. (FAC ¶ 81.) But, as Lehigh admits, the Board's sole finding on vested rights contained no mention of production intensities. (FAC ¶ 82.) Regardless, the Supreme Court undercut this use of equitable estoppel in *Hansen* when it confirmed that a "county may seek an injunction or other penalties authorized by the zoning ordinance, whenever it believes that production at [a] mine has reached a level that constitutes an impermissible intensification of the [vested] nonconforming use." (*Hansen*, *supra*, 12 Cal.4th at p. 575.) As to aggregate production, Lehigh does not allege conduct that led it to believe that export of unprocessed aggregate to a neighboring quarry via an internal haul road is within the scope of its vested rights. And even if the County did induce this belief, Lehigh cannot show "actual injury" if the County were to require a use permit as the 2019 Application is still pending and Lehigh has not initiated the new activities it describes, and cannot initiate them prior to final approval. (*Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 258.)

Even were the elements of equitable estoppel satisfied, Lehigh's claims would fail because it has not pled the "extraordinary" circumstances that would exempt this case from the rule barring equitable estoppel against the government. (*Attard v. Board of Supervisors of Contra Costa County* (2017) 14 Cal.App.5th 1066, 1079 ["Equitable estoppel will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy."].) In particular, "[c]ourts have severely limited" equitable estoppel in land use cases like the instant one. (*Ibid*; *see Hansen*, *supra*, 12 Cal.4th at p. 564 [rejecting equitable estoppel because "county lacks the power to waive or consent to violation of the zoning law"].) As in *Attard,* Lehigh's claim that the County induced reliance through an application approval does "little to distinguish this case from any other case where a party claims reliance on a government permit." (*Attard*, at p. 1080.) If anything, this case is distinguishable only be the fact that Lehigh has not even initiated, or secured approval for, the activities for which it claims an entitlement. (*Cf. ibid.*) On the other side of the equation, estoppel "will not be recognized when [it] . . . would nullify a strong rule of policy adopted for the public"—here, State and County laws barring impermissible intensification or substantial change to a vested mining operation. (*Hansen*, at p. 564.)

C. Lehigh Fails to Identify a Breached Ministerial Duty

Lehigh also seeks a writ of traditional mandate under Code of Civil Procedure section 1085 directing the County to process its 2019 Application without adjudicating vested right consistency and to prepare the environmental impact report ("EIR"). For this writ to issue, Lehigh must show a "clear, present, and usually ministerial duty," which the County is failing to perform to Lehigh's injury. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) Lehigh cannot.

1. Lehigh cannot state a claim for failure to properly process its 2019 Application.

Lehigh contends in its sixth cause of action that the County is derelict in its duty to process the 2019 Application under Article 3 of the Permit Streamlining Act ("PSA"), Government Code section 65943 et seq., and corresponding County procedures governing determinations of application completeness, Sections 5.20.080 et seq. of the County Zoning Ordinance. But Lehigh fails to identify any clear ministerial duty that the County is not already discharging. As Lehigh admits (FAC ¶ 97), the County has already deemed its application complete, thereby discharging its duties

under section 5.20.080 of the Zoning Ordinance and section 65943 of the PSA. The County is undisputedly proceeding to take action on the 2019 Application by adjudicating its consistency with Lehigh's vested rights. (FAC ¶¶ 114-16.) And Lehigh does not allege that the County had made an improper request for "new or additional information" after the County deemed the Application complete. (*See* Gov. Code, § 65944(a).) Lehigh's admissions are dispositive.

To the extent that Lehigh seeks to impute into the PSA and Zoning Ordinance a ministerial duty on the part of the County to process the 2019 Application without revisiting its decision to deem the application complete (FAC ¶ 179), this claim would likewise fail on the pleadings as Lehigh cannot show that the County is derelict in any such duty. First, the County has not shown any intent to revisit its completeness decision, and Lehigh's only allegation otherwise (FAC ¶ 114) is "contrary to judicially noticed facts" and must be disregarded. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1141; *see* Section II.C, *supra*; RJN, Ex. K.) Second, such a claim is not ripe, as the vested rights consistency hearing that Lehigh alleges might reopen the completeness decision has not taken place, and Lehigh can only speculate about its results. (*See State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 746 [mandamus claim unripe "because there is no actual dispute appropriate for judicial resolution"].) And third, this claim rests on the flawed premise that by deeming the 2019 Application complete, the County implicitly found the activities it proposes to be within the scope of Lehigh's vested rights. Not so. An agency's completeness determination is a ministerial one that considers only whether an application contains requisite information to make it "acceptable for processing" (Zoning Ord., § 5.20.080(A); *see* Gov. Code § 65943(b) [agency is "limited to determining whether the application . . . includes the information required by the [agency's] list"]; *Adams Point Preservation Society v. City of Oakland* (1987) 192 Cal.App.3d 203, 206 [ministerial actions involve "no special discretion or judgment"].) By contrast, whether the 2019 Application satisfies State and County laws precluding substantial changes to a vested operation is an adjudicatory determination that goes to the merits of the application and its approvability. (*See* Zoning Ord., §§ 4.10.370(Part I)(F), (Part I)(I)(2) [Planning Commission shall review reclamation plans to assure substantial compliance with SMARA and County ordinances prior to approval]; Section III.A.i, *supra*.) Rendering this adjudicatory decision at the completeness

stage would contravene the limits of the agency's authority and would be impossible to accomplish by the PSA's 30-day deadline for ministerial completeness decisions. (Gov. Code, § 65943(a).)

Lehigh's seventh cause of action fails to identify any ministerial duty at all. Rather, Lehigh alleges that the County "inten[ds]" at the vested right consistency hearing to "make a new completeness determination," to "reject[] the evidence previously submitted by Lehigh," and to "replace it with evidence" assembled by County staff. (FAC ¶ 187.) But, as discussed above, the County has not made a decision on vested rights consistency and Lehigh's allegation that the County might reopen its completeness determination is wholly conjectural and misunderstands the nature of a completeness determination under the PSA and the County's Zoning Ordinance. Further, any claim that the County might improperly weigh or disregard evidence on vested rights consistency is unripe as no vested rights consistency hearing has been held, evidentiary record compiled, or determination made, and a mandate directing the County to proceed in accordance with the law would only amount to an improper advisory opinion. (*See Honig*, *supra*, 13 Cal.App.4th at 748.)

2. Lehigh cannot state a claim for failure to timely complete and certify the EIR.

Lehigh next claims that the County is derelict in its duty to certify the EIR for the 2019 Application within one year of deeming the Application complete. But there is no such clear ministerial duty. Lehigh cites to Section 21151.5 of the Public Resources Code, which generally requires a one-year timeline for local agencies to complete and certify EIRs. (Pub. Resources Code, § 21151.5(a)(1).) But Section 21151.5 does not make those deadlines "self-executing" nor "fix [them] in cement," instead allowing for extensions where circumstances warrant. (*Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1261-62; Pub. Resources Code, § 21151.5(a)(4).) Lehigh also relies on Section 15108 of the CEQA Guidelines, providing that "the lead agency shall complete and certify the final EIR . . . within one year" of accepting the application as complete. (14 Cal. Code Regs., § 15108.) But the CEQA Guidelines "are not strict standards," instead "allowing for flexibility of action and conduct of governmental agencies faced with what are frequently complex and difficult decisions which could affect the environment." (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 632.)

Even if the CEQA statute or Guidelines imposes such a ministerial duty, Lehigh's own

dilatory conduct bars it from stating a claim. (*See* 14 Cal. Code Regs., § 15109 ["unreasonable delay by an applicant in meeting requests by the lead agency necessary for the preparation of . . . an EIR" suspends timelines]; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1440 ["[C]onduct of an applicant may . . . act as a waiver of CEQA's time requirements."].) The County's November 8, 2019 letter informed Lehigh that EIR preparation could not commence until the Department was presented with a single, consolidated application. (RJN, Ex. F.) Yet despite multiple requests by the County and an exhortation by the State Mining and Geology Board, Lehigh failed to withdraw its overlapping Haul Road Application until March 24, 2020. (RJN, Exs. G-I, N.) Until that occurred, the County lacked the "accurate, stable, and finite" project description required to prepare an EIR. (*Stopthemilleniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17; *see also Schellinger*, *supra*, 179 Cal.App.4th at 1269 [applicant's submittal of multiple iterations of a project design after complete date meant that agency lacked a project description "well enough defined to provide meaningful information for environmental assessment"].)

Likewise, Lehigh's continuing refusal to agree to an EIR scope or pay consultant fees required to initiate the EIR keeps the timelines in abeyance. (FAC ¶¶ 120-24.) As Lehigh admits, the County is "functionally unable to process the 2019 Application" or begin EIR preparations until Lehigh approves the budget and scope. (FAC ¶ 100; *see* Pub. Resources Code, § 21089(a) ["lead agency may charge and collect a reasonable fee" for EIR].) Lehigh's refusal to render payment prejudices the County's ability to meet EIR certification timelines and bars Lehigh in laches from obtaining relief in mandamus. (*See Schellinger*, *supra*, 179 Cal.App.4th at p. 1268.) For similar reasons, Lehigh's claim should be dismissed as moot because a writ of mandate could do no more than direct the County to prepare the EIR, which Lehigh admits the County will do as soon as it receives payment. (FAC ¶ 123; *see TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 147 [proceeding "will be dismissed as moot" where evidence shows compliance]; *Schellinger*, at pp. 1264, 1266 [CEQA timelines enforceable only by writ directing compliance].)

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court sustain this demurrer on all causes of action without leave to amend.

Dated: June 15, 2021

Respectfully submitted,

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

PROOF OF SERVICE BY ELECTRONIC MAIL

Lehigh Southwest Cement Company, et al. v. County of Santa Clara, et al. Case No.: 21CV376423

I, Linda Ramos, declare:

I am now and at all times herein mentioned have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is 70 West Hedding Street, 9th Floor, San Jose, California 95110-1770. My electronic service address is: linda.ramos@cco.sccgov.org. On **June 15, 2021**, I electronically served copies of the following:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO THE FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

to the people listed below at the following electronic service address:

Mark D. Harrison
Harrison Temblador Hungerford & Johnson LLP
Email: mharrison@hthjlaw.com

Sean Hungerford
Harrison Temblador Hungerford & Johnson LLP
Email: shungerford@hthjlaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **June 15, 2021**.

/s/ *Linda Ramos*
Linda Ramos